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Mitigating Murder*

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Abstract: In *Loss of Control and Diminished Responsibility*, Alan Reed and Michael Bohlander collect a wide range of essays on the eponymous partial defences to murder. These essays provide detailed analysis of recent English reforms in this area and place these reforms in comparative perspective. This review considers the contribution made by this book to the explanation and evaluation of partial defences. It concentrates in particular on the exculpatory force of loss of control; the distinctness of loss of control from diminished responsibility; and the defences' unique mitigatory effect.

Introduction

Homicide is widely regarded as the most serious type of criminal offence. Particular tokens of homicide, however, vary greatly in their seriousness. Grading of homicide offences is therefore pervasive. At common law, there are two grades of homicide: murder and manslaughter. Both are offences of causing death; the difference between them lies in the level of culpability that they require. Contemporary English law draws the distinction as follows. An actor, D, commits murder when D kills another person, V, and D either intends to kill or to cause serious harm. Manslaughter then encompasses other forms of culpable killing. D commits manslaughter if D kills V and is either reckless or grossly negligent as to V's death; or if D causes V's death by performing an unlawful and dangerous act.¹

An interesting sub-class of cases straddles this line between murder and manslaughter. These are cases of so-called *voluntary* manslaughter. In these cases, D has the required *mens rea* for murder: D intends to kill or to cause serious harm. But there are

* A review of Reed & Bohlander (2011).

¹ The definitions of these basic homicide offences in England are still governed entirely by the common law. For a summary, see Richardson (2012, ch. 19.1).

extenuating circumstances that reduce D's culpability. D is therefore to be convicted of manslaughter rather than murder – and hence can avoid the mandatory sentence of life imprisonment that attaches to a murder conviction.² In such cases, D is said to be guilty of manslaughter on the grounds of a *partial defence*.

Until recently, the partial defences in English law were governed by the Homicide Act 1957. The most important of these were diminished responsibility (s. 2) and the common law defence of provocation (s. 3).³ Roughly, diminished responsibility applied where D was suffering from an 'abnormality of mind' that 'substantially impaired his mental responsibility' for the killing. Provocation applied where D was provoked to lose his self-control and 'the provocation was enough to make a reasonable man do as [D] did'. These defences were controversial for a number of reasons. Provocation in particular had been heavily criticised, on two principal grounds. First, the 'reasonable man' test proved difficult to apply consistently and justly.⁴ Second, the focus on loss of self-control yielded unfair results: in particular, it privileged sudden losses of temper (such as those borne of sexual jealousy) over more sympathetic 'slow-burn' reactions (such as those experienced by victims of domestic violence).⁵

Following a lengthy reform process, the law on partial defences in England and Wales changed in October 2010, with the bringing into force of the relevant provisions of the Coroners and Justice Act 2009.⁶ These provisions redefined diminished responsibility and replaced provocation with a new defence of 'loss of control'. The new definition of diminished responsibility (s. 52) is, at least ostensibly, little more than a modernisation of the old one. The defence now requires D to have been suffering from an 'abnormality of mental functioning' arising from 'a recognised medical condition'. This abnormality must have impaired D's capacity to 'understand the nature' of her conduct, 'to form a rational judgement', and/or 'to exercise self-control'. This must in turn 'explain' the killing: which is to say, it must have been 'a significant contributory factor in causing' it.

² Murder (Abolition of Death Penalty) Act 1965, s. 1(1).

³ It is also a partial defence that the killing occurred in pursuance of a suicide pact: Homicide Act 1957, s. 4. The offence of infanticide also effectively functions as a partial defence to murder: Infanticide Act 1938, s. 1.

⁴ Contrast in particular *R v Smith (Morgan)* [2001] 1 AC 146 and *A-G for Jersey v Holley* [2005] UKPC 23.

⁵ See Barry Mitchell's chapter in Reed & Bohlander (2011) for a useful summary of the arguments here.

⁶ See in particular Law Commission (2004; 2006). The Commission's recommendations on partial defences were but one part of a larger set of recommendations on the law of homicide, many of which were rejected by the Government of the time: see Ministry of Justice (2008).

The loss of control defence differs more significantly from its predecessor. Like provocation, the new defence requires that D's acts have resulted from a 'loss of self-control' (s. 54(1)(a)). Now, though, the loss of self-control must also have had one or both of two specific 'qualifying triggers'. The first is 'fear of serious violence from V against D or another identified person' (s. 55(3)). The second is anything 'done or said' that 'constituted circumstances of an extremely grave character' and 'caused D to have a justifiable sense of being seriously wronged' (s. 55(4)). The new defence also employs a new 'objective' test, worded as follows: 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D' (s. 54(1)(c)). For the purposes of this test, any of D's circumstances may be taken into account, with the exception of those whose only relevance is that they 'bear on D's general capacity for tolerance or self-restraint' (s. 54(3)). The new statute also specifically provides that D's loss of control need not be sudden (s. 54(2)) and that sexual infidelity is not a qualifying trigger (s. 55(6)(c)).

In *Loss of Control and Diminished Responsibility*, Alan Reed and Michael Bohlander have assembled a wide-ranging collection of essays addressing these reforms. As its subtitle suggests, the book presents both 'domestic' and 'comparative' perspectives on this area. It is divided into two parts along these lines. The first part provides a detailed analysis of the English partial defences under the new legislation. Topics addressed are the extent to which the 2009 Act has changed the definition of diminished responsibility (Ronnie Mackay) and the likely impact of these changes (Rudi Fortson); the role of the concept of loss of control (Barry Mitchell); the new objective test and its likely impact (Richard Taylor); the new qualifying triggers and the status of domestic abuse (Jonathan Herring), sexual infidelity (Alan Reed and Nicola Wake) and 'things said or done' (Jesse Elvin); the extent to which the reforms will solve the problems of gender injustice associated with the old provocation defence (Susan Edwards); and the retention of sex as a characteristic of the hypothetical person for the purposes of the objective test (Neil Cobb and Amanda Gausden).

The second part of the book then considers mitigations of murder in other jurisdictions. Several of the essays in this part of the book relate to jurisdictions influenced by the English common law tradition, including the Republic of Ireland and Northern Ireland (John Stannard); Scotland (James Chalmers); British Overseas Territories, Crown Dependencies and the Commonwealth Caribbean (Claire de Than); New Zealand (Warren

Brookbanks); and the United States (Paul Robinson; Alan Reed and Nicola Wake). There are also several essays addressing non-common law jurisdictions, including France (Catherine Elliott; Caroline Fournet); Germany (Michael Bohlander); the Netherlands (Hein D Wolswijk); and Spain (Manuel Cancio Melia). Two further essays address Islamic criminal law (Mohammad M Hedayati-Kakhki) and international criminal law (John Cubbon).

In this review, I will not attempt a comprehensive assessment of the merits of these various contributions. Given their depth and breadth, I doubt that anyone is adequately qualified for such a task. Moreover, I doubt that this kind of analysis would be of much interest to this journal's readers. For the most part, these essays aim to elucidate the implications of the new English reforms (in the case of the first part of the book) and to set out the law in related areas in other jurisdictions (in the case of the second part). They do not engage directly in the conceptual, explanatory and normative kinds of enquiry that are most likely to interest philosophers and theorists of criminal law. Nevertheless, they clearly have much to say that is relevant to such enquiries. My main aim in this review will be to identify the contributions that this book makes in these areas.

I will examine three broad topics on which theorists might engage with *Loss of Control and Diminished Responsibility* (hereafter '*LCDR*'; page numbers in parentheses refer to this book). First, I consider the scope and exculpatory force of the loss of control defence. I argue that *LCDR* gives us cause to doubt the soundness of loss of control as a basis for exculpation. Second, however, I suggest that *LCDR* provides reasons against collapsing loss of control and diminished responsibility into one another. In particular, the book lends support to the view that the justificatory and objective elements of the former defence are significant. Finally, I examine the unique mitigatory effect of the partial defences. *LCDR* provides strong evidence of a relationship between this effect and the existence of mandatory penalties for murder. I suggest, though, that a better understanding of offence labelling is required before we can draw firm normative conclusions about this issue.

Loss of Control as Excusing Condition

The Law Commission for England and Wales (2004) had proposed to abandon loss of self-control as a requirement for the replacement provocation defence. As its name suggests, though, the new loss of control defence retains this requirement. This leads to a familiar

problem, already highlighted above: *viz.*, that a focus on loss of control alone seems to render the defence both over- and under-inclusive. On the one hand, loss of control as a criterion tends to prejudice those whose acts are borne of justifiable fear or anger, but whose reactions to these emotions are not ‘sudden and temporary’. On the other, it potentially admits claims grounded in less sympathetic emotions. For example, killings borne of sexual jealousy are potentially partially excusable if loss of control alone is a basis for exculpation.

The new reforms attempt to solve this problem by employing three strategies, all of which are discussed at length in *LCDR*. Two of these are largely designed to narrow the scope of the defence to include only sympathetic losses of control. First, to be eligible for the defence, one’s loss of control must now have a ‘qualifying trigger’. Second, it must satisfy a re-formulated objective test. The third strategy is to broaden the legal concept of loss of control in order to include a greater number of sympathetic cases. Thus, the law now explicitly provides that losses of control need not be sudden. Let us consider these strategies – and what the contributors to *LCDR* have to say about them – in turn.

Qualifying Triggers

Although the name is novel, the concept of a ‘qualifying trigger’ is arguably already familiar in the theory of excuses. One important element of excuse defences is the ‘excusing condition’: the mental state (such as cognitive or volitional incapacity) that diminishes culpability. However, excusing conditions alone are not usually thought sufficient for a defence, for two general reasons. First, not all tokens of excusing conditions have exculpatory force. Often, these conditions only excuse when they are ‘triggered’ by certain events or states of affairs (such as threats or mental illness). Second, the law has good policy reasons to impose clear limits on the availability of excuse defences. In particular, there are reasons to define these defences in ways that do not disrupt the clear communication of the law’s primary norms, and that make it difficult for actors to rely on them in advance.⁷

These considerations might be thought to support the specification of particular qualifying triggers in the new loss of control defence. Now, defendants must show that their

⁷ See Horder (2007, ch. 1.2) for discussion of these policy concerns.

loss of control was caused by either (or both of) a ‘fear of serious violence’, or events that produced a ‘justifiable sense of being seriously wronged’. For brevity’s sake, let us refer to these as the *fear* trigger and the *anger* trigger respectively. One advocate of these new devices in *LCDR* is Jonathan Herring. Herring argues that they will create a substantial change of emphasis in murder trials. Whereas evidence about the defendant’s psychological state was previously decisive, the key question will now be whether the defendant was in fact seriously wronged. If so, then the other requirements of the defence will (Herring argues) be relatively easy to satisfy. This improves the prospects of domestic abuse victims who kill their abusers. Such defendants will no longer be forced to rely on dubious evidence about the psychological effects of so-called ‘battered woman syndrome’. Instead, they can rely primarily on the seriously wrongful character of their abusers’ previous actions (66-68).

This development highlights an underlying controversy about the basis for exculpation in cases of provocation and loss of control. In an article cited by several of the contributors to *LCDR*, Alan Norrie (2010) argues that there are two possible rationales for these defences: ‘compassionate excuse’ and ‘imperfect justification’. The old law reflected the former rationale: we extend compassion to some of those who lose control over their actions, as a concession to human frailty. The new law, by contrast, represents at least a substantial step towards the latter: the fear and anger that motivate a killing may be justified even when the killing itself is not. Again, there are links here to debates in the theory of excuses more generally. Some commentators argue that excuses always have a justificatory component: they apply to actions that are unjustified, but that reflect a justified emotion or belief. Indeed, according to these commentators, this is precisely what distinguishes loss of control and provocation from diminished responsibility.⁸

I return to this issue in the next section. For now it will suffice to note that, if Herring is correct, then the qualifying triggers seem to have considerably improved the scope of the loss of control defence. By focusing on the causes of a defendant’s loss of control, trials will focus (the argument goes) on precisely the question that determines the sympathy due to the defendant. Generally, however, other contributors to *LCDR* are less optimistic than Herring about this aspect of the reforms. Consider, for instance, Jesse Elvin’s remarks on the new law’s treatment of sexual infidelity. *Prima facie*, the new law seems to admit sexual

⁸ See especially Gardner (2009). For doubts about the separability of justifications for emotion and actions expressing those emotions – pertinent to the discussion in this sub-section – see Bennett (2012).

infidelity as a qualifying trigger, since there are surely at least some circumstances in which people might justifiably feel seriously wronged by it. For the reasons highlighted above, though, we should be cautious about admitting sexual jealousy as a valid basis for exculpation. The new law avoids this result via an *ad hoc* exclusion of infidelity as a qualifying trigger. But as Elvin highlights, this seems arbitrary if justified anger is truly the basis for exculpation in the new defence (144-149).

This perhaps suggests deeper problems with the law's recognition of justified anger as a valid basis for a loss of control. One way to illuminate these problems is to compare the role played by the anger trigger to that played by the fear trigger. Is there any reason why the former should generate more controversy than the latter? Catherine Elliott's chapter is useful in answering this question. Elliott observes that there is considerable overlap between the fear form of loss of control and the English law of self-defence: there are few imaginable cases in which defendants could plead the former but not the latter (232-236). This suggests that the distinctive work of the loss of control defence is done mostly by its more familiar anger form. One can contrast this with the position in French law. The French definition of self-defence is similar to the English one (239-240); however, there is no equivalent defence covering 'righteous anger' cases. This reflects the changing attitudes of French legislators. It is now felt that 'heat of passion' ought not to be a basis for exculpation in civilised societies. In fact, in some circumstances, this may even be treated as an aggravating factor (236-238).

This lack of enthusiasm for anger-based excuses outside the common law world is also evidenced elsewhere in *LCDR*. Consider, for instance, the chapters on Spanish, German and Dutch criminal law, by Manuel Cancio Melia, Michael Bohlander and Hein D Wolswijk respectively. Again, in many respects, the range of relevant defences available in these systems is approximately equivalent to that found in English law. Some of them also have defences of excessive self-defence that are similar in their scope to the fear form of loss of control (252-253; 334-335). But none of them recognises a defence equivalent to the anger form of loss of control or common law provocation. At most, equivalent concepts ground mitigations of sentence. For example, provocation can mitigate murder sentences in German law (263), and Spanish law generally recognises 'violent emotion' as a mitigating

factor (349-350). Dutch law, meanwhile, does not recognise provocation as a concept at all (330-332).⁹

How might we explain this resistance to anger-based defences? This issue is not discussed extensively in *LCDR*. I suspect, though, that the answer has to do with the potentially admissible ‘justifications’ for anger. Unlike in the context of fear and threats, the criminal law has no established framework for adjudicating these. The justifiability of a ‘sense of being seriously wronged’ is thus likely to depend largely on jurors’ opinions. This creates a risk that undesirable moral viewpoints will be imported into the law. For example, one might be concerned at the potential role of outdated notions of honour in juries’ reasoning.

Mohammad Hedayati-Kakhki illustrates the logical extremes of this possibility in his chapter on Islamic criminal law. Islamic law condones killings motivated by marital or familial honour: they are considered justified (316-319). Obviously enough, this view is substantively different from that taken in the criminal law of secular states. Significantly, though, this substantive difference also reflects a structural difference. Secular states typically claim a monopoly on the right to punish; Islamic law, by contrast, extends rights of vigilante punishment to private citizens (315-316; 321-323). A potential worry about an excuse grounded in a ‘justifiable sense of being seriously wronged’ is that it tends to undermine this distinction. It risks communicating that private retribution is in some degree acceptable. Again, one can contrast fear-based defences in this regard. It is well established that threats can alter the legal permissibility of private citizens’ actions; thus, the policy reasons against granting fear-based excuses are comparatively weak.¹⁰

The New Objective Test

The second strategy employed in the new law for improving the scope of the loss of control defence is the re-formulation of the objective condition. This condition is now rendered thus: ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint and

⁹ It is worth noting here the unusual position in Scotland, summarised in James Chalmers’ chapter in *LCDR*. In some respects, Scots law follows the continental trend: generally, the defence labelled ‘provocation’ applies only to excessive defence-type cases. Killings in response to sexual infidelity are recognised, however, as the sole exception to this rule.

¹⁰ There is much more to be said here about the relationship between criminal defences and state monopolies on the use of force. See e.g. Thorburn (2008; 2011).

in the circumstances of D, might have reacted in the same or a similar way to D'. In this context, D's circumstances include any circumstances 'other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance and self-restraint'. There are several subtle changes here from the old provocation defence.¹¹ Essentially, though, this new wording states more clearly the principle that the English courts had previously arrived at: what is 'objective' about the test is the level of self-control to be expected of D.¹² In other respects, the test is 'subjectivised' to account for D's characteristics and the circumstances in which he or she acted.

Again, there are suggestions in *LCDR* that this new wording has improved the scope of the defence. If nothing else, it seems to provide the logical form for an objective test in cases where the (putative) excusing condition is a loss of self-control. The strongest support for this proposition in *LCDR* is provided in Claire de Than's chapter. De Than investigates the law of provocation in the British Overseas Territories and Crown Dependencies, and in the independent Commonwealth Caribbean states. This chapter is independently interesting for its insight into these unusual legal systems. For the present purposes, though, its most important finding concerns the tendency for interpretations of the law in these jurisdictions to converge. With a couple of intriguing exceptions,¹³ the provocation defence in the territories surveyed is based on either the old English common law or the 1957 Act. Over time, courts have tended to arrive independently at the interpretation of the objective test just highlighted: viz., that the test is 'objective' with respect to its expectations of D's self-control. De Than suggests that much time and energy in the English reform process might have been saved if reformers had attended to this trend (228-230).

The gloss on the objective standard employed in the new legislation might also be seen as an improvement. Rather than simply using the language of self-control, the new objective test invokes a hypothetical person with a normal degree of *tolerance* and self-restraint. Richard Taylor considers this development in his contribution. He suggests that this choice of wording constitutes a deliberate change in the law: 'tolerance' is not simply an alternative way of describing 'self-restraint'. Rather, the introduction of a standard of

¹¹ For a summary, see Richard Taylor's chapter in *LCDR*.

¹² *A-G for Jersey v Holley* [2005] UKPC 23. It should be noted that, as a decision on the law of Jersey, this case was not technically binding in English law; however, as a Privy Council decision, it was essentially made by judges of England's highest court.

¹³ Principally Bermuda, whose criminal code is based on aspects of English, Canadian and Australian law. Its provocation defence is apparently based on Queensland provisions that have now been abolished (211-212).

tolerance incorporates additional demands into the objective test. In particular, the defence now excludes reactions borne of defendants' possessiveness and bigotry, as well as those resulting from short temper (52-54). This works alongside the new qualifying triggers to narrow the scope of the defence in relation to unsympathetic cases.

Other contributors to *LCDR* have reservations about the new formulation of the objective test. Neil Cobb and Amanda Gausden, for instance, question its retention of sex as a characteristic of the hypothetical person. Interestingly, arguments both for and against this position were made during the reform process from a desire to secure sex and gender equality in the application of the test (101-102). For Cobb and Gausden, though, it is clear that the retention of a sexed standard does not promote this goal. This risks entrenching judge and jury stereotypes by suggesting that there is such a thing as a 'typically female' reaction to provocation (103-106). Because of the structure of the defence, it also implies that the capacity for self-control is sex-sensitive: D's sex will be taken into account even if its only possible relevance is to D's 'general capacity for tolerance or self-restraint'. This leads Cobb and Gausden to suggest an alternative solution: sex and gender should be treated as part of D's circumstances (108-112). This would permit reference during trials to structural inequality without perpetuating decision-makers' prejudices.

Susan Edwards also argues for a further amendment to the new test. As we have seen, the standard embodied in this test may be 'subjectivised' in any respect except the required capacity for tolerance and self-restraint. Edwards argues, though, that this does not go far enough. There are circumstances in which it is unfair to judge defendants by objective standards of self-restraint, notwithstanding that their other characteristics and circumstances have been accounted for. Edwards' example is defendants whose inability to meet the required standard is caused by the triggering conduct itself. Domestic abuse victims who kill their abusers may not possess an ordinary level of self-control; however, it seems unfair to judge them by that standard if the relevant lack of capacity was caused by the abuse that led to the killing (83-85).

Once again, these observations track underlying controversies in the theory of excuse. Some argue that objective standards – standards that are not sensitive to the relevant capacities of a particular defendant – are a hallmark of true excuses. They are part

of what distinguishes excuses (such as loss of control) from denials of responsibility.¹⁴ Others argue that there is room in the criminal law for ‘diminished capacity’ defences, grounded in what we can fairly expect of *particular* defendants. But these are nevertheless distinct from *objective* capacity-based excuses like loss of control. On this view, abuse might properly be admitted as part of the circumstances in which the hypothetical person finds him or herself. However, we should not be tempted to subjectivise the relevant standard, even in cases where the defendant’s capacities have been impaired by abuse. Effectively, this would be to collapse loss of control into diminished capacity.¹⁵

Redefining Loss of Control

So far, we have considered two strategies employed in the new law for improving the scope of the loss of control defence. Generally, these are both aimed at narrowing the scope of the defence in order to exclude unsympathetic cases. Perhaps the most controversial aspect of the traditional provocation defence, though, is its *under*-inclusiveness. By requiring a loss of self-control, this defence tends to exclude ‘slow-burn’ responses to provocation: most problematically, those experienced by victims of prolonged domestic violence who kill their abusers in non-confrontation situations. The new statute aims to solve this problem decisively by explicitly declaring that ‘it does not matter whether or not the loss of control was sudden’. Thus, although the new defence is narrower in some respects than provocation, it also admits a broader range of losses of control as potential bases for it.

This new legal conception of loss of control is obviously problematic. As Barry Mitchell observes, it is difficult to imagine a loss of self-control, properly so-called, that is entirely non-sudden and non-temporary.¹⁶ A requirement for a loss of control of *any* kind thus seems to be a significant limitation on the availability of the defence – particularly in the very cases that the reformers were keenest to include (45). Edwards suggests that this illustrates a fundamental problem with the language of ‘loss of control’. As we saw, the new qualifying triggers suggest that fear, as well as anger, can now be a valid basis for the

¹⁴ Again, see mainly Gardner (1997); Macklem & Gardner (2001).

¹⁵ See e.g. Horder (2007, chs. 3 and 4). Horder, indeed, accuses the English courts of making precisely this mistake in *R v Smith (Morgan)* [2001] 1 AC 146.

¹⁶ Mitchell quotes Norrie (2010, p. 288) on this point: ‘[I]t might be thought, a test for and constitutive feature of any loss of self-control in anger is that it have an element of suddenness. How else does one identify a loss of self-control, except as a moment of departure from being in control?’

defence. But Edwards argues that, notwithstanding this, the focus will inevitably remain on anger. This is because 'loss of control' signifies angry responses, rather than fearful ones. Whatever the intentions of the reformers, the law will thus continue to privilege the wrong kinds of reaction (87-89).

One may or may not agree with Edwards' hypothesis here. Either way, one can appreciate the conceptual point. The paradigmatic loss of control is sudden and temporary. Thus, if we choose to keep this concept at the heart of the defence, we are unlikely to solve the problems with it simply by stipulating that losses of control need not be sudden. Indeed, by forcing this concept to do normative work that it is not equipped to do, we are likely if anything to create new problems. For example, we could surely characterise some calculated revenge killings as arising from non-sudden losses of control. Moreover, at least some such killings surely reflect a justifiable sense of being seriously wronged. The only way for the law to prevent defence claims of this sort from being put to juries is, again, by means of an *ad hoc* exclusion. Thus, the new statute had to provide explicitly that one may not claim the defence if one killed 'in a considered desire for revenge'.

Merging Loss of Control and Diminished Responsibility

This third strategy for improving the scope of the loss of control defence epitomises its problems. A defence that partially excuses killings resulting from a loss of self-control is inevitably both over- and under-inclusive. By itself, this is not fatal to such a defence: we can employ strategies to improve its scope. The use of qualifying triggers, objective tests and an expanded concept of loss of control all achieve this to some extent. But these strategies themselves require certain *ad hoc* alterations: for example, the exclusion of sexual infidelity and revenge killings. And even these alterations arguably fail to render the scope of the defence entirely satisfactory. This strongly suggests that the main problem with the new defence is its continued emphasis on loss of control itself.

Despite this, however, most people will surely retain the intuition that some killings covered by the loss of control defence *should* be partially excused. This raises a further question. If loss of control is not a sound basis for exculpation in those cases where partial defences should be granted, then what is? Mitchell is the only contributor to *LCDR* to tackle this question explicitly. Echoing the criticisms just summarised, Mitchell argues that

defendants in sympathetic cases are not plausibly excused because they lost their self-control. Drawing on earlier work, he instead suggests that the true basis for exculpation in these cases is essentially a form of diminished responsibility:

In cases where we are likely to be sympathetic, the accused's state of mind might well be described as 'abnormal'... What matters for the present discussion is that we may call the accused's state of mind abnormal in two quite different ways. It may be abnormal in the sense that it is not that person's normal or usual state of mind (it is abnormal for him or her), or we may describe it as abnormal in the strict psychiatric sense. In either case the accused's mental processes may have been so disturbed that he/she should not be regarded as wholly responsible for the killing. Thus, the basis on which liability is reduced is one of partial denial of responsibility. (48)

At least in this chapter, Mitchell does not set out in detail the form that his proposed merger would take.¹⁷ However, the topic is discussed elsewhere in *LCDR*. In particular, the US Model Penal Code defence of 'extreme mental or emotional disturbance' is considered at some length. This is essentially a merged defence of the kind that Mitchell advocates.¹⁸ Like the common law of provocation that still applies in some US jurisdictions, its effect is to reduce murder to manslaughter. It applies where:

...murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹⁹

Paul Robinson argues that this defence should be preferred to the common law. His main reason for this is that it discriminates between offenders in a way that more accurately

¹⁷ But see Mackay & Mitchell (2003; 2004); Mitchell, Mackay & Brookbanks (2008).

¹⁸ This statement is perhaps controversial: Robinson notes that the defence was not designed as an analogue to diminished responsibility, or as a diminished capacity defence. However, the Code's drafters did emphasise its applicability to *mental* disturbance specifically. See *LCDR*, pp. 299-300.

¹⁹ US Model Penal Code s. 1.12(2), cited in *LCDR*, p. 294.

tracks their blameworthiness. Indeed, it is sufficiently effective in this respect that, in principle, it ought to be extended to *all* offences. This could be achieved by generally providing for a reduction in offence grade where the defence applies; at the very least, it should generally result in mitigation of sentence (306-309).

US legislators, by contrast, have not shared Robinson's enthusiasm for the Model Penal Code defence. Of the 34 US states that have codified their criminal law in response to the Model Code, only 11 have adopted the extreme mental or emotional disturbance provision, usually doing so only partially.²⁰ The remainder continue to employ some variation on the common law of provocation (302). Robinson notes that this level of resistance to reform is unique to the homicide context. He suspects that the dysfunctional politics of crime in the US is to blame: no politician wants to be seen as 'soft on crime', much less 'soft on murderers'. Because of this, the more restrictive common law defence is preferred regardless of whether it better reflects public intuitions about just outcomes in murder cases (304-305).

UK readers will doubtless identify with Robinson's suspicions here. Nevertheless, in light of the discussion in the previous section, his pathologisation of resistance to the Model Penal Code defence seems too quick. Certainly, 'extreme mental or emotional disturbance' has greater *prima facie* plausibility as an excusing condition than 'loss of control'. But as we have seen, only some tokens of such conditions may ground excuse defences. The only limit on the availability of the Code defence is the requirement for a 'reasonable explanation or excuse'. Given the almost limitless range of imaginable explanations and excuses that might be offered for emotional states, one would anticipate that this defence will be over-inclusive in practice. Experience seems to confirm this hypothesis: according to Alan Reed and Nicola Wake, the defence has resulted in an 'evaluative free-for-all' in those jurisdictions that have adopted it. Thus, to give an extreme example, an Arkansas jury found that an accused had a reasonable explanation for his murderous anger on the basis that the victim, his fiancée, had danced with another man at their engagement party (124).²¹

²⁰ Alan Reed and Nicola Wake note that a common variation involves removing the word 'mental', thus effectively turning the provision into an expanded provocation defence (195).

²¹ Of course, one might respond that this finding was simply incorrect: the fiancée's dancing with another man does not *in fact* provide a reasonable excuse for the accused's anger. But this response misses the point. The formulation is problematic precisely because the reasonableness of an excuse must be treated as a question of fact. This inevitably leaves the defence open to the influence of objectionable jury attitudes.

It is worth noting at this point that even the less controversial (in the UK, at least) diminished responsibility defence is limited in its availability in ways that the Model Penal Code defence is not. Again, there is a broad excusing condition at the heart of this defence: impaired capacity to understand the nature of one's conduct, to form a rational judgement and/or to exercise self-control. But these impairments must have a specific type of cause: an abnormality of mental functioning arising from a recognised medical condition. As Ronnie Mackay and Rudi Fortson highlight in their chapters, this is narrower even than the previous law's requirement for an 'abnormality of mind' *simpliciter*. By referring to recognised medical conditions, the law effectively incorporates extra-legal diagnostic criteria as limitations on the availability of the defence (16-17; 29-30).²²

None of this is yet to say, of course, that such limitations are ultimately justifiable. Advocates of a merged defence might respond that these limits mainly reflect policy concerns: as a matter of normative theory, we ought to grant partial defences to all of those whose killings arise from extreme disturbance, of whatever kind. Adjudicating this matter lies well beyond the scope of this review. The point here is merely that the normative assumptions made by most of the contributors to *LCDR* are incompatible with a merged defence. It is widely assumed in this book that certain kinds of emotional disturbance – most obviously, those associated with sexual jealousy or possessiveness – are *in principle* invalid bases for exculpation. As we saw in the previous section, there are different possible ways of explaining this. Perhaps these emotions are not justified. Perhaps we may expect people to control them. Alternatively, perhaps anger is not really a valid basis for exculpation at all: the defence should focus mainly on fear. In any event, the normative concerns at issue here seem to be richer than the Model Penal Code defence can account for.

The Mitigatory Effect of the Partial Defences

So much, then, for the exculpatory *force* of loss of control and diminished responsibility. What about their exculpatory *effect*? The structure of these defences implies that they do

²² Both Mackay and Fortson also highlight an additional requirement of the new diminished responsibility defence that was not present in the old law: that the relevant abnormality must explain the killing. They differ, though, on whether this change will make a difference in practice. Mackay argues that it will (17-19), whilst Fortson argues that its impact is likely to be 'more apparent than real' (35-37).

not completely negate culpability, such that no liability is warranted. Rather, they partly negate culpability, such that liability should be mitigated.²³ Uniquely, though, this mitigation does not just consist of a reduction in sentence. It also includes a reduction in conviction, from murder to the lower offence grade of manslaughter. Can *LCDR* help us to understand this?

If one were to read only the first part of the book, then one would probably have to answer this question in the negative. After reading the second, comparative part of the book, however, one explanation for the unique effect of loss of control and diminished responsibility starts to seem obvious. This is that English law retains a mandatory sentence of life imprisonment for murder. In order to mitigate murderers' punishment in sympathetic cases, it is therefore necessary to offer them a partial defence. As Robinson concludes in his chapter:

It is worth noting that the issues discussed here might, or might not, be of great importance. The extent of their importance depends on the nature of a jurisdiction's sentencing system and the practical effects that follow from the determination of offence grade... If the system has mandatory minimum sentences that attach to the offence grade, and if those mandatory minimums are high enough to be significant, then the grading assessment can be quite important... On the other hand, if the only effect of the grade is to set a maximum sentence beyond which the sentencing judge may not go, as is commonly the case, then the distinction may have limited importance. (309-310)

We have seen that continental European jurisdictions tend only to recognise provocation and diminished responsibility as, at most, mitigating factors in sentencing. As Robinson's remarks suggest, this reflects something significant about the sentencing systems of these jurisdictions. In the absence of mandatory minimum sentences, partial defences need not have an effect on offence grading. For some contributors to *LCDR*, this point is so obvious as to be almost self-evident. Thus, Wolswijk writes that:

²³ For further reflection on the nature of partial defences, see Husak (2010).

The notion of ‘partial defences’, with the result that a certain mandatory punishment, such as life imprisonment, need not in fact be imposed, is not a feature of Dutch criminal law. After all, Dutch law contains no specific minimum punishments (and thus no ‘mandatory punishments’, either), but merely maximum punishments. (330)

Other continental jurisdictions deviate from this pattern. German law, for example, does impose mandatory minimum penalties for homicide offences: murder carries a minimum sentence of five years’ imprisonment (263).²⁴ As we have seen, though, provocation is also explicitly recognised as a mitigating factor in murder cases in Germany. Whilst it does not reduce the offence to a lower grade, it reduces the mandatory minimum penalty to one year’s imprisonment. This further illustrates Robinson’s point. Even if this kind of mitigation is not a partial defence in the sense that common lawyers usually understand that term, it still excludes the usual mandatory penalty. It therefore plays a similar role to the partial defences in English law.

Perhaps the most instructive discussion of the relationship between partial defences and mandatory sentencing in *LCDR* comes from a common law perspective. This is Warren Brookbanks’ discussion of partial defences to murder in New Zealand. Until recently, the structure of homicide in New Zealand reflected its English lineage: murder, carrying a mandatory life sentence, could be mitigated by provocation. But in 2009, both the mandatory life sentence for murder and the provocation defence were abolished. At least part of the case for this was that the latter was only thought necessary because of the former.²⁵ In the absence of mandatory sentencing, the familiar problems with provocation outweighed the reasons for its retention (272-277). More recently, further developments in New Zealand have confirmed this connection from the opposite direction. Following the introduction of a new ‘three strikes’ law, a third serious offence automatically results in the maximum available punishment for that offence: for murder, life imprisonment without parole. This leads once again to the possibility that provoked killers will receive severe

²⁴ Aggravated forms of murder do, however, carry a penalty of life imprisonment (263).

²⁵ It should be noted, though, that Brookbanks identifies a high-profile provocation case and subsequent public outcry as the immediate cause of the defence’s abolition (277-278). Again, readers from other jurisdictions will doubtless find this plausible.

mandatory penalties. Doubt has correspondingly been cast on the exclusion of provocation as a partial defence (287-289).

In light of the second part of *LCDR*, then, the mandatory life sentence inevitably emerges as the elephant in the room in debates about the English reforms. It should be emphasised, though, that this is not necessarily a criticism of the English contributors to the first part of the book. These contributors are surely aware of the distorting influence of the mandatory life sentence; their apparent lack of interest in it probably rather reflects its sacred status in UK political life.²⁶ There is no realistic prospect that the mandatory life sentence for murder will be abolished in the near future. Thus, debate about the proper definition and scope of the partial defences remains worthwhile. It is enough that *LCDR*, in its comparative mode, evidences the distorting effects of mandatory sentencing on the doctrines of the substantive criminal law.

One caveat to these remarks should be issued. We may certainly *infer* from the comparative chapters in *LCDR* that the mandatory life sentence for murder necessitates partial defences. But this is not yet a knockdown argument for this claim. There may be significant differences between English law and other systems that render partial defences to murder appropriate in the former context. In particular, there may be good reason to avoid labelling those who kill under the influence of loss of control or diminished responsibility as murderers. We could conclude this even if we believed that the mandatory life sentence for murder should be abolished. Indeed, we learn from Brookbanks' chapter that some opposed the New Zealand reforms on precisely these grounds. Provocation, it was argued, should be retained even if the mandatory life sentence were to be abolished, because of the unique stigma that a murder conviction carries (274-275).

This view gains plausibility once we appreciate the varying structures of homicide offences surveyed in *LCDR*. As we saw, the highest grade of homicide at common law is distinguished by its *mens rea*: on the contemporary English interpretation, intention to kill or to cause serious harm. In other jurisdictions, meanwhile, additional factors are used to identify the most serious homicides. For instance, the highest grade of homicide might require a particular *mens rea* plus the presence of additional aggravating factors. This is the

²⁶ Hence, the Law Commission's terms of reference for its review of homicide excluded consideration of the mandatory life sentence. The Commission considered the retention of the sentence to be a decisive argument in favour of partial defences to murder (2006, p. 44).

model apparently adopted in the criminal law of Germany and the Netherlands. We learn from Bohlander's chapter that German law recognises offences of murder and aggravated murder: the latter requires certain motives for or means of killing, in addition to intention (263). And Wolswijk tells us that, in Dutch law, the basic homicide offence is one of intentional killing: the highest grade also requires premeditation (326).

Does the relative breadth of a murder offence defined solely by reference to *mens rea* mandate the availability of partial defences? This is one of the most interesting questions arising from *LCDR*. It is, however, a question that Anglophone criminal law theory currently lacks adequate resources to answer. Whilst offence labelling is recognised as a significant issue, the nature of labelling and its normative force are currently poorly understood.²⁷ Hence, even given empirical data on public understanding of terms like 'murder' and 'manslaughter', the significance of such data is not yet clear. Until further progress is made in this area, it will be difficult to say with any certainty whether the partial defences should be retained even if the mandatory life sentence is not. Suffice it to say for now that this sentence is the main reason why partial defences – and books like *LCDR* – continue to be worthy of our attention.

Conclusions

Loss of Control and Diminished Responsibility contains a wealth of information about partial defences to murder in England and elsewhere. Much of this is relevant to an understanding of both the exculpatory force of these defences and their exculpatory effects. The book tells against the retention of loss of control as an excusing condition. But it also gives us reasons to be sceptical about attempts to collapse the loss of control defence into diminished responsibility. In particular, it suggests that there is something important about both the justificatory and objective elements of loss of control – although precisely what this is remains controversial. Finally, I have suggested that the book demonstrates very clearly the salience of the mandatory life sentence for murder in debates about the partial defences. If this sentence were to be abolished, it is at least doubtful that the partial defences would need to be retained.

²⁷ But see Chalmers & Leverick (2008) for an excellent prelude to further discussion.

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